highway. The foundation of public right lies in dedication and dedication presumes a dedicator who in this case can only be the owner of the land over which the right of way has been granted. In the absence of any definite proof of actual and deliberate dedication the courts are entitled to adopt the legal fiction of assuming dedication from proved facts.

The defendants denied dedication. It is said that the third defendant merely granted the use to a limited number of persons, that is, those who bought the lots after the subdivision and that he had no intention to dedicate to the public. Nevertheless, the path has been used by the public, particularly those living within the vicinity, for many years even before he acquired ownership of the land without interruption. He has in fact taken no step to ensure that a public right of way is not so created. The path has been used and enjoyed by the public as a right for so many years openly and without interruption and must be known to the owner of the land.

The plaintiffs are merely using the common law method of establishing a public right of way by proof of dedication. The learned judge was within his right to accept it, and we see no reason to interfere with his decision. Accordingly, we would dismiss the appeal with costs. Deposit to the plaintiffs to account of taxed costs.

Appeal dismissed.

Solicitors: *Jag-Jit Singh & Co; Lim Kean Chye & Co.*

Reported by *Prof Ahmad Ibrahim*

Ng Tien & Anor v Chow Nim Yan

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-207 OF 1989
LEE HUN HOE CJ (BORNEO), HARUN HASHIM AND JEMURI SERJAN SCJJ
14 JULY 1990

Societies — Trust — Whether plaintiffs had capacity to sue as trustees of society — Whether land held in trust for society — Constructive trustees

Trusts and Trustees — Constructive trust — Whether land held in trust for society

This was an appeal from the decision of the High Court by the appellants purporting to act as trustees of a society.The High Court had dismissed the appellants' claim for a declaration that a piece of land was held by the respondent as trustee for the society and for an order that the land be transferred to the names of the appellants as trustees and other consequential orders. In the High Court the learned judge confined himself to two issues only, whether the plaintiffs-appellants had the capacity to sue as trustees of the society and secondly whether the defendant-respondent held the property in trust for the society. The learned judge held that the plaintiffs had failed to prove their case on the two issues and dismissed the claim. The appellants appealed.

Held, allowing the appeal:

(1) The learned judge's approach to the first issue was solely based on the legal position excluding altogether the position of the appellants from the standpoint of equity. Even if the appellants were not properly elected in accordance with the Rules of the society, the court, if at all necessary, may yet intervene to raise a constructive trustee for equity does not want for a trustee. If the trustees who were elected at a committee meeting could be made liable or accountable to the society it is axiomatic that they should be capable of suing as well. The appellants are therefore constructive trustees for the society for the purpose of the action.

(2) The appellants in the court below had produced overwhelming incontrovertible contemporaneous documentary evidence to prove that the land in question from the time the society was established and thereafter had always been regarded as the property of the society. In this case quite clearly a trust has been established as evidenced by the various documents and exhibits produced in the court below and not by a trust deed that the learned judge in the High Court looked for. On the true perspective of the documentary evidence and applying the principles enunciated in *Soar* v *Ashwell*,[5] *Rochefoucauld* v *Boustead*[4] and *Wan Naimah* v *Wan Mohamed Nawawai*,[3] the court was satisfied there was a trust in respect of the land and that the respondent held the land in trust for the society.

[Bahasa Malaysia summary

Ini adalah rayuan dari keputusan Mahkamah Tinggi yang dibawa oleh perayu yang mendakwa mereka pemegang amanah sebuah syarikat. Mahkamah Tinggi telah menolak permohonan perayu untuk deklarasi bahawa tanah yang berkenaan dimilik oleh responden sebagai pemegang amanah syarikat itu dan permohonon supaya tanah itu dipindahmilik ke nama perayu sebagai pemegang amanah dan perintah-perintah berbangkit. Di Mahkamah Tinggi hakim yang arif membincangkan dua isu, iaitu samada plaintif-perayu mempunyai keupayaan membuat tuntutan sebagai pemegang amanah dan yang kedua samada defendan-responden memegang harta itu sebagai amanah untuk syarikat it. Hakim yang arif berpendapat plaintif telah gagal membuktikan tuntutan

mereka atas dua isu itu dan menolak tuntutan itu. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan:

(1) Pendekatan hakim yang arif terhadap isu yang pertama bersandar hanya atas kedudukan di sisi undang-undang tanpa menyentuh kedudukan perayu dari segi ekuiti. Walaupun perayu tidak dilantik mengikut peraturan syarikat itu, mahkamah, jika perlu, boleh campur tangan dan mewujudkan pemegang amanah konstruktif oleh kerana ekuiti tidak kekurangan pemegang amanah. Jika pemegang amanah yang dilantik di mesyuarat jawatankuasa boleh dijadikan bertanggungjawab kepada syarikat itu, adalah jelas dan terang tanpa bukti bahawa mereka boleh juga membuat apa-apa tuntutan. Oleh kerana itu perayu-perayu adalah pemegang amanah konstruktif bagi syarikat itu untuk maksud tindakan ini.

(2) Perayu di Mahkamah Tinggi telah mengemukakan keterangan suratan yang banyak dan yang tidak boleh dipertelingkahkan yang membuktikan bahawa dari masa syarikat itu wujud, tanah itu telah dianggap sebagai harta syarikat itu. Di dalam kes ini jelaslah amanah itu telah dibuktikan daripada dokumen-dokumen dan eksibit-eksibit yang dikemukakan di Mahkamah Tinggi dan bukan dari suratikatan amanah seperti yang dicari-cari oleh hakim yang arif di Mahkamah Tinggi itu. Atas pandangan yang wajar terhadap keterangan suratan dan mengenakan prinsip-prinsip yang disebutkan di dalam kes *Soar* v *Ashwell*,[5] *Rochefoucauld* v *Boustead*[4] dan *Wan Naimah* v *Wan Mohamed Nawawai*,[3] mahkamah berpuashati bahawa telah wujud amanah terhadap tanah itu dan responden memiliki tanah itu sebagai amanah untuk syarikat itu.]

Cases referred to

1 *English* v *Dedham Vale Properties Ltd* [1978] 1 All ER 382 (folld)
2 *Phipps* v *Boardman* [1965] Ch 992 (folld)
3 *Wan Naimah* v *Wan Mohamed Nawawai* [1974] 1 MLJ 41 (folld)
4 *Rochefoucauld* v *Boustead* [1897] 1 Ch 197 (folld)
5 *Soar* v *Ashwell* [1893] 3 QB 390 (folld)
6 *Oh Hiam & Ors* v *Tham Kong* [1980] 2 MLJ 159 (folld)
7 *Osman & Anor* v *Mek* [1972] 2 MLJ 158 (folld)

Appeal from: Civil Suit No 390 of 1983 (High Court, Ipoh)

Sri Ram (*A Iruthaya Raj* with him) for the appellants.
Lee Seong Yan for the respondent.

Cur Adv Vult

Jemuri Serjan SCJ (delivering the judgment of the court): This is an appeal by Ng Tien and Chee Kim Fah, purporting to act as trustees of Gunung Rapat Fook Tat Chee Mutual Aid Society, against the decision of the High Court given on 3 June 1989 at Ipoh. The learned judge in the High Court dismissed the appellants' claim for a declaration that the land situated on plot 356, Gunung Rapat New Village Ipoh, now under Certificate Title HS(M) UK 63/83 lot 148, was held by the respondent, Chow Nim Yan as trustee for the said society, by an order for the respondent to transfer the said land into the names of the appellants and all other consequential orders including damages.

The facts in so far as they are relevant to the issues before us can be briefly stated as follows.

On 25 September 1956, an application for the registration of Gunung Rapat Fook Tat Chee Mutual Aid Society under the provisions of the then Societies Ordinance 1949 was submitted to the Assistant Registrar of Societies Ipoh by Chee Foh Nyean, Teoh How Khian and Ng Tien, describing themselves therein, as president, vice-president and treasurer of the proposed society. Form 1 of the Societies (Registration Rules) 1953 was also submitted wherein it was stated that the office bearers and committee members of the proposed society consisted of Chee Foh Yee as president, Teh How Khiam as vice-president, Ng Tien as treasurer, Cheah Kean Sam, general affairs, Chin Kean, auditor, Chin Hon Siong, secretary and Chow Nim Yean, Lee Sin Chy, Chee Teng Wah and Chin Kim Moon as committee members.

The society was duly registered on 17 May 1957 but was reregistered on 26 July 1966 following the coming into force of the Societies Act 1966 (Act 335) which also repealed the Societies Ordinance 1949.

It is relevant to mention here at this stage that in Form 1 it was also stated that the immovable property of the society was the building of Fook Tat Chee on lot 356, Gunung Rapat New Village and the address of the society was also given as lot 356 Gunung Rapat New Village, Ipoh.

There was also a reference to this building in exh P24, ie the statement of receipts and payment for the period from 1 July 1957 to 31 December 1957, recorded under the heading 'Assets' to be worth $1,500. The same exhibit indicated that as on 31 December 1957 the total assets of the society was in the sum $2,362.70. To avoid confusion it is relevant at this stage to emphasize that lot 356 actually was officially described as plot 356 and is the land whose ownership is being disputed in this action. Later on another piece of land was acquired by the society some time in 1978 known as lot 652 where a new and bigger temple was built. It is also pertinent to mention that the old temple adverted to in the proceedings in the High Court was actually a wooden shophouse building on plot 356 which was used by the society as a shrine in the early days. However, later on, on the completion of the new temple on lot 652 the old shophouse was rented to Gunung Rapat Trading Co. By December 1979, according to exh P15A the assets of the society were worth $77,565.03. So much for the properties of the society and their worth.

Some time in 1967 an application was apparently made by the respondent to the Collector of Land Revenue, Ipoh for the alienation of plot 356. The respondent sent two reminders to the Collector of Land Revenue, once by a letter dated 25 July 1973 and later by a letter dated 31 October 1973 in respect of this application. Nothing was

heard of this application until 28 September 1979 when a notice that land revenue is due and a notice to apply for title were sent and addressed to the respondent at lot 352 Gunung Rapat, informing him to apply for a qualified title and to pay various fees totalling $440 in respect of the land applied for. On 1 March 1953, a temporary occupation licence (which expired in 1982) was registered in the name of the respondent. This temporary occupation licence specifically mentioned that it was in respect of plot 356 Gunong Rapat New Village Ipoh. Thereafter, a qualified title was issued on 4 March 1983 and registered in the name of the respondent in respect of a piece of land 1,500 sq ft more or less known as lot 148, bearing the title number HS(M) UK 63/83. By way of clarification it is pertinent to state that lot 148 referred to in the qualified title actually is a new lot number allocated to what was formerly known as plot 356. The land in dispute before us therefore is quite clearly lot 148 although in the court below this land was referred to as lot 356 throughout the proceedings.

In the court below the learned judge confined himself to two issues only, namely, whether the plaintiffs had the capacity to sue as trustees of the society and secondly, whether the respondent held the property in trust for the society. The learned judge after assessing the evidence adduced before him held that the plaintiffs failed to prove their case on the two issues and dismissed the claim.

Whether the appellants are trustees of the society

On this issue it was evident that the learned judge placed great reliance on the validity of the appellants' appointment as trustees, having regard to the provisions of r 8 of the Rules of the society. It was the respondent's case in the court below that the appellants were not properly elected as trustees and at the date of the filing of the suit their appointments had already expired. We observed that r 8 provides for the election of three trustees at the annual general meeting to hold office for a period of three years only. In his judgment the learned judge found no documentary evidence that the plaintiffs were appointed trustees at the time of the institution of the suit since the names of the trustees were never mentioned in the annual returns of the society which were submitted to the Assistant Registrar of Societies in Ipoh from 1959 to 1986. The appellants failed to produce a copy of the relevant trust deed to prove that they were trustees. Even if the appellants were elected as trustees under the Rules of the society they were elected in contravention of r 8(a) in that five instead of three trustees were elected, not at the annual general meeting as required by the rule, but at a committee meeting held on 1 January 1978 and that at the time of the filing of the suit their appointments had already lapsed. Rule 8 of the society, it must be emphasized, is the embodiment of the requirement of s 25 of the Societies Act 1966 (Act 335).

Whilst we agree with the learned judge that the appellants together with Liew Jit Moi, the respondent, and Wong Gin Hup were elected at the committee meeting held on 1 January 1978 to reelect the new committee members and office bearers for the term 1978-1979 in contravention of r 8(a), we are not prepared to agreed that the appellants could not be treated as trustees of the society for the purpose of this action. For one thing, the impugned election of the trustees may be rectified at an annual general meeting considering that all this while since the inception of the society the office bearers, the committee members and the trustees had been responsible for the management and conduct of the affairs of the society. That they had and still do act in a fiduciary capacity can hardly be argued. We do not fail to observe that under r 8(a) the trustees are responsible for the immovable properties and the investment of funds of the society. It is also implicit in s 9 of the Societies Act that movable and immovable property of the Society are vested in the trustees and it would appear that the appellants had all along considered themselves to be trustees and had accordingly in good faith acted as such without being challenged by anyone within or without the society.

In the court below exh P25 was produced which represented a resolution appointing the trustees of the society and duly signed by the trustees referred to therein. The trustees were Ng Tien, one of the appellants, Chow Nim Yan, the respondent and Wong Keng Hup, sometimes referred to as Wong Gin Hup. Nevertheless this resolution was not dated and we could only venture to say with diffidence that in all probability it was submitted to the assistant registrar's office together with exh P24, namely, the statement of receipts and payments for the period from July to 31 December 1957, bearing in mind that the society was registered on 17 May 1957 and that although the office bearers and other committee members were named in the application form for registration the trustees were not mentioned because they were to be elected at the annual general meeting later. We mention this just to show that the society had prima facie since its registration elected its trustees to look after the property of the society. The election of the trustees may not be carried out in strict compliance with reg 8(a), nevertheless it was done in accordance with the spirit and letter of s 25 of the Societies Act which provides by sub-s (1) that every registered society must have one or more trustees.

The learned judge's approach to the first issue was solely based on legal considerations excluding altogether the position of the appellants from the standpoint of equity. In our view even if the appellants were not properly elected in accordance with the Rules of the society this court, if at all necessary, may yet intervene to raise a constructive trustee for equity does not want for a trustee. See *Snell's Principles of Equity* (27th Ed) at p 191. In holding this view we find support in the case of *English* v

Dedham Vale Properties Ltd.[1] Slade J at pp 385-386 quoted the case of *Phipps* v *Boardman*[2] where Lord Denning MR at pp 1017-1019 said:

> These two gentlemen took on themselves an authority which they did not truly possess: and, by virtue of this assumed authority, they obtained information and knowledge which they would not otherwise have got. This sort of thing has happened often enough before. There are many cases in the books where a person has assumed to have authority when in truth he has none. It has always been held that he is accountable just as if he had in fact the authority which he assumed. The classic instance is an executor de son tort. If a person intermeddles with the assets of an estate in such a way as to denote an assumption of the authority of an executor, he is accountable just as if he were an executor, see *Stamford's case* [(1574) 2 Leo 223], *Read's case* [(1605) 5 Co Rep 336]. Likewise with a man who assumes to act as bailiff without authority. Thus in 1590 in *Gawton* v *Lord Dacres* [(1590) 1 Leo 220], Anderson CJ said: 'If one become my bayliff of his own wrong, without my appointment, he is accomptable to me ...'. So with a person who assumes to act as trustee. In *Rackham* v *Siddall* [(1849) 1 Mac & Cr 607], Lord Cottenham LC held that a lady, who took on herself to act as trustee, was as liable as if she were in truth a trustee.

By virtue of his appointment as an office bearer and president of the society the appellant, Ng Tien, holds office in a fiduciary relationship in regard to the society, and together with the other office bearers are accountable to the society in respect of the properties of the society. As such since he had acted and still acts in a fiduciary capacity which imposes relevant fiduciary duties upon him, he can also be held as a constructive trustee. Again in that same case Slade J at p 398 said:

> I do not think that the categories of fiduciary relationships which give rise to a constructive trusteeship should be regarded as falling into a limited number of strait-jackets or as being necessarily closed. They are, after all, no more than formulae for equitable relief. As Ungoed-Thomas J said in *Selangor United Rubber Estates Ltd* v *Cradock (No 3)* [[1968] 2 All ER 1073 at 1097]:
>
> 'The court of equity says that the defendant shall be liable in equity, as though he were a trustee. He is made liable in equity as trustee by the imposition or construction of the court of equity. This is done because in accordance with equitable principles applied by the court of equity it is equitable that he should be held liable as though he were a trustee. Trusteeship and constructive trusteeship are equitable conceptions.'

With respect, we agree with this view on the formulation of a category of constructive trusteeship. In the result it is our view if the trustees who were elected on 1 January 1978 could be made liable or accountable to the society it is axiomatic that they should be capable of suing as well. For the reasons we have stated above we hold that the appellants are constructive trustees for the society for the purpose of this action.

Whether the respondent holds lot 148 in trust for the society

The answer to this issue must of necessity depend upon the evidence adduced before the court below and must be viewed upon a true perspective of the facts. The respondent's case basically is based on his denial that he was ever a trustee, that the land was applied by him for himself and not on behalf of the society and that he paid for the land himself and not out of the funds of the society. For that reason he claimed the land was alienated to him and registered in his personal name and not in the name or in trust for the society. He therefore averred that he was both the legal and beneficial owner of the land. He admitted that he was a committee member about 20 years earlier but never as a trustee and that he also paid for all the assessments on the land. However all this denial and protestation were not borne out by oral and contemporaneous documentary evidence, particularly the latter. In fact his evidence was inconsistent with the documentary evidence adduced in the court below.

In his evidence, the appellant, Ng Tien, categorically averred that the land in dispute was applied by the respondent but in his capacity as the then chairman of the society and the premium, survey fees and rent were paid out of the funds of the society. The respondent therefore acted in a fiduciary relationship. Originally he agreed to transfer the land to the society after the qualified title was issued but later reneged on this promise. The appellants, Chee Kim Fah, supported Ng Tien in this respect, adding that the society nominated the respondent to apply for the said land on behalf of the society. In the court below, the learned judge took the view that the plaintiffs had failed to substantiate their claim and upon a balance of probabilities he decided in favour of the defendant.

The appellants in the court below had produced in our opinion overwhelming incontrovertible contemporaneous documentary evidence to prove that the land in question right from the time the society was established and thereafter had always been regarded as the property of the society. This documentary evidence which was in existence before the present suit, bear close examination. As we have said earlier, Form 1 and the statement of receipts and payments in exhs P23 and P24 respectively contained reference to the said land, ie plot 356 as assets of the society. At the meeting of the committee of the society on 1 October 1977, the question of the rental for the old temple building at No 356 was discussed and Ng Tien was appointed to be in-charge of the matter. See exh P5.

On 1 November 1977, Ng Tien on behalf of the society entered into an agreement with Gunung Rapat Trading Co whereby the latter agreed to rent the workshop at No 356 for a period of five years at a rental of $207 per month. See exh P6. This was of course before the issue of the qualified title HS (M) UK 63/83 to the respondent

and in our own minds, it is clear from this that even on those dates this land was consistently regarded as the property of the society.

Exhibit P2 was a letter written by the respondent on 24 July 1973 enquiring about his application for land in 1967 in respect of plot 356 and requesting that if approval was granted the temporary occupation licence should be issued in the name of the society. Quite obviously the reference to 'temple' in this letter was a reference to the society. A reminder was sent by the respondent on 31 October 1973 in respect of the same matter. See exh P3. It appears that following the inquiries a qualified title HS(M) UK 63/83 was registered in the name of the respondent on 19 February 1983 and issued to him on 4 March 1983 as exhibited in the agreed bundle. What is of great significance from our point of view is exh P7 which is actually a notice that land revenue is due dated 28 September 1979 where a total sum of $440 was stated as due from the respondent in respect of the application for land No 25-77, a reference to plot 352, when considered in the light of exh P15A, namely, the receipt and expenditure account for the period from July to 31 December 1979 and exhs P18 and P19, namely, the minutes of the committee meetings of the society held on 26 July 1979 and 15 October 1979.

The meeting on 26 July 1979 which was attended by Ng Tien and the respondent together with 19 other members decided to authorize Ng Tien, as president of the society, to apply for land title for the old temple at No 356 and that all expenses in respect of the application would be reimbursed by the society. The meeting held on 15 October 1979 was attended by Ng Tien together with 39 other signatures but the respondent was not recorded as one of the members present at the meeting. Ng Tien made a report on the progress of the application for titles for the old temple. The meeting also approved the allocation of a sum of $450 to pay for the expenses relating to the application of the land. This piece of evidence corroborates Ng Tien's evidence where he stated that the amount of $440 was paid by him to the respondent for the land and $10 for his fare. The examination of the evidence left us in no doubt whatsoever that plot 356, the land in dispute, was applied for the society and all expenses relating to the application for the land were paid by the society out of the funds of the society. It is inconceivable that a meeting attended by 40 members of the society could have approved the sum of $450 out of the society's funds for the personal use and benefit of the respondent. There was not even a suggestion that it was a loan to the respondent. On this premise, the inevitable conclusion is that the land was applied for by the respondent at the request of the society on behalf of the society.

Of significance also are the exhibits pertaining to the receipts of payment of rental to the society by the Gunung Rapat Trading Co since 1 November 1977, namely, the date of the tenancy agreement referred to earlier, until 9 March 1984. These receipts were issued by the society to Gunung Rapat Trading Co in payment of rental for the shophouse at No 356. The income from the rental of the shophouse in the sum of $1,242 was reflected as income of the society under the heading of 'Income' as evidenced by exh P15A, namely, the statement of income and expenditure for the period from July to December 1979. In any event if plot 356 is the property of the respondent there is no valid explanation why the rentals were consistently paid into the account of the society and not in the personal account of the respondent and why the society was quoted as owner/landlord in the tenancy agreement.

It was submitted by counsel for the respondent that the sum of $450 was payment for lots 651 and 652 where the new and bigger temple was built. We are unable to find evidence in support of this contention. On the other hand, all the evidence available and adduced in the High Court points conclusively to the fact that the sum of $450 was in fact for the payment of the alienation of plot 356, otherwise known officially as lot 148. Both the notice that land revenue is due and the notice to apply for qualified title referred to in the agreed bundle made reference to the land application No 25-77. This was followed by the issue of the qualified title HS (M) UK 63/83. Significantly enough the temporary occupation licence issued on 1 March 1983 contained particulars pertaining to the location of the land applied for which was stated therein as situated at Gunung Rapat New Village lot 356, namely, the piece of land where the old temple, otherwise referred to as a shophouse, was built. It was this particular piece of land that the parties to the action had been talking about all along. Therefore we find no basis to hold that lot 148, erstwhile known as plot 356, is not the land on which the sum of $450 was expended.

There is also overwhelming evidence on the promise of the respondent to transfer the land in dispute to the society made at various meetings of the society. According to the minutes of the committee meeting held on 19 June 1980, (see exh P21) attended by Ng Tien, the respondent and 23 other members, the respondent, referred to in the minutes as trustee Chow Nim Yan, told the meeting that once the title had been granted action would be taken to transfer the property back to the community meaning of course the society. He told the meeting that since at that material time the land was still held under the temporary occupation licence nothing could yet be done about the transfer. At another meeting held on 16 September 1980, also attended by Ng Tien and 36 other members but not apparently by the respondent, the question of the land in dispute was again brought up. See exh P 20. The meeting decided to form a sub-committee to meet the respondent to discuss the position of the land. Woon See at the meeting of the committee on 7 November 1980 reported

that he and one Lim Keng Fong, a member of the sub-committee, had 'visited the temple trustee Chow Nim Yan regarding the temple property'. It was proposed at that meeting that two more trustees were to be added to the trustees of the old temple at plot 356 but the respondent objected. According to the minutes of the meeting the respondent was reported to be in an angry mood declaring that at that moment he trusted no one and proposed to wait until suitable people were found before he would hand over the property.

At the trial of this case the respondent produced exh D321A which was a minute of the meeting of the committee held on 16 April 1978 the purpose of which was said to discuss the spring tomb sweeping ceremony, the opera shows and the title of the old temple at No 356. Present at the meeting were Ng Tien, Chow Nim Yan and 25 other members. There it was proposed to appoint one additional trustee for the land in dispute. The respondent reported that the land in dispute was still under temporary occupation licence and so no additional name was allowed to be registered in respect thereof. He explained that there was no necessity to spend more money on the land but suggested to wait for the title to be issued and then action would be taken to transfer the land back to the society. Here is clear and undisputed evidence of the undertaking by the respondent to transfer the land back to the society. He could not have made that undertaking unless he had also impliedly acknowledged the fact that all along he had been registered as owner of the land in trust for the society. Exhibits P20, P21 and P22, namely, the minutes of the meeting held on 16 September 1980, 19 June 1980 and 7 November 1989 respectively, are relevant.

On the ultimate analysis we find that all the documentary evidence adverted to earlier proves beyond doubt that the respondent knew all along he applied the land on behalf of the society and that when the temporary occupation licence and the qualified title were issued in his name, he held the land in trust for the society. The society had all along since its formation and registration treated the land in issue as the property of the society. What appears to have weighed heavily on the mind of the learned judge was the fact that he found that the appellants could not explain why the respondent was asked to apply for the land in his own name and therefore ignored the importance and cogency of the various contemporaneous documentary evidence establishing the fiduciary relationship between the respondent and the society in respect of the land. This led to the fallacy in his judgment.

Several cases have been cited by both sides to support their contention. None except the case of *Wan Naimah* v *Wan Mohamad Nawawai*[3] is really in point, and that only on the establishment of a trust. The case of *Rochefoucauld* v *Boustead*[4] supports our view on the position of the respondent, as trustee, in respect of the land in dispute. According to the heading of this case, prior to 1873 the plaintiff, a married woman, was owner of certain estates in Ceylon subject to a considerable mortgage. In 1873 the mortgagees sold and conveyed the estates to the defendant, who, without the privity of the plaintiff raised large sums by mortgage of them, and afterwards became bankrupt in 1879, and obtained his discharge in 1880. The estates were afterwards sold by the mortgagees. The plaintiff's case was that the defendant had purchased the estates as trustee for her subject to a lien for his advances. In 1880 the defendant's trustee in bankruptcy repudiated the plaintiff's titles. The defendant never expressly did so, and the plaintiff never gave either of them to understand that she had given up her claim; but she took no active steps to assert it till 1894, when she commenced the action against the defendant asking for a declaration that the defendant purchased as a trustee for her, and for an account of his dealings with the property, and payment of what should be found due from him. The defendant pleaded — (1) that the estates were conveyed to him as beneficial owner; (2) that the trust alleged by the plaintiff was not evidenced by any writing signed by the defendant, and that the Statute of Frauds was a defence. Kekewich J held that no trust was proven, and dismissed the action on the first ground. The Court of Appeal being of opinion that the evidence, which partly consisted of letters signed by the defendant, completely proved that the defendant purchased as a trustee for the plaintiff, and held the estates as such trustee subject to a lien for his expenditure. In that case a Court of Appeal found from the various correspondence between the plaintiff and the defendant concerning the land and the remittances from the defendant to the plaintiff from the profits of the estates proved the existence of an express trust.

In some respects this case resembles very much the present case before us in that the trust can be established from the various documentary evidence. Lord Lindley LJ, who delivered the judgment of the court, said this at p 205:

> The circumstances under which the Delmar estates were conveyed to the defendant are to be gathered from the verbal testimony of the plaintiff, the defendant and Mr Duff, and a mass of correspondence both before and after the conveyance. The correspondence after the conveyance is relied upon by the plaintiff as being inconsistent with the defendant's contention that he acquired the estates for himself beneficially free from any trust in favour of the plaintiff.

Further down the page Lord Lindley LJ continued to say:

> We come, therefore, to the conclusion that the plaintiff has proved that the estates in question were conveyed to the defendant on 27 May 1873, upon trust for her, but subject to a charge in his favour in respect of all sums advanced by him in order to obtain the estates from the Dutch company in the first instance, and of all sums advanced by him in order to work them as coffee plantations after he had acquired them.

In this case Lindley LJ described the trust which the plaintiff had established as an express trust within the meaning of that expression as explained in *Soar* v *Ashwell*.[5] In *Soar* v *Ashwell*[5] Bowen LJ at p 397 has this to say:

> It is not necessary in the present appeal to discuss the somewhat fluctuating expression that can be discovered in equity authorities on the subject of constructive trusts. One thing seems clear. It has been established beyond doubt by authority binding on this court that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue he received it. He never can discharge himself except by restoring the property, which he never has held otherwise than upon this confidence: *Chalmer* v *Bradley* [17 Ves 87], *Marquis of Cholmondeley* v *Lord Clinton* [2 Jac & W 1, 190]; and this confidence or trust imposes on him the liability of an express of direct trustee.

In that case there was no specific trust deed. Likewise in the instant case quite clearly a trust has been established as evidenced by the various documents and exhibits produced in the court below and not by a trust deed that the learned judge looked for in the High Court. Applying the principles enunciated in *Soar* v *Ashwell*[5] and *Rochefoucauld* v *Boustead*[4] and *Wan Naimah* v *Wan Mohamad Nawawai*[3] and on the true perspective of the documentary evidence before us, we are satisfied that there is a trust in respect of the land and that the respondent holds lot 148 in trust for the society. We therefore would allow the appeal with costs here and below.

The appellants also sought for an order that the respondent transfer the said land into the names of the appellants. Applying the decision of the Privy Council in the case of *Oh Hiam & Ors* v *Tham Kong*[6] and of *Osman & Anor* v *Mek*[7] and s 417 of the National Land Code 1965 we would grant this order. To ensure the dispute be finally put to rest we think it would be also proper to make an additional order that the respondent do cause the transfer of the land under reference into the names of the trustees of the society within four weeks of the date of this judgment failing which the senior assistant registrar of the High Court Ipoh shall then effect the transfer forthwith. However there will be no order for damages.

Appeal allowed.

Solicitors: *Raj Selva & Co; Mohd Noor & SY Lee.*

Reported by *Prof Ahmad Ibrahim*

Mohd Yusof lwn Pihakberkuasa Yang Mengadakan Mahkamah Tentera TLDM dan Satu Yang Lain

MAHKAMAH TINGGI (IPOH) — USUL PEMULA NO 25-74-89
ABDUL MALEK H
3 JULAI 1990

Angkatan Tentera — Bidang kuasa mahkamah tentera — Bolehkah membicarakan kesalahan di bawah Akta Dadah Berbahaya 1952 — Makna 'kesalahan awam' — Akta Angkatan Tentera 1972, ss 87, 88 & 103(1) — Akta Dadah Berbahaya 1952, s 6 — Akta Dadah Berbahaya 1952 (Pindaan) A426, s 41(1), (2) & (3) — Akta Dadah Berbahaya 1952 (Pindaan) A553, s 41(1) — Akta Mahkamah Rendah 1948, s 85 — Akta Mahkamah Rendah 1948 (Pindaan) A434, s 85 — Kaedah-Kaedah Prosedur Angkatan Tentera (Mahkamah Tentera) 1976, kk 6 & 61(1)

Tafsiran Statut — Pemansuhan statut — Adakah s 88 Akta Angkatan Tentera 1972 dimansuhkan secara implikasi oleh s 41(3) Akta Dadah Berbahaya 1952 (Pindaan) A426 yang berkuatkuasa terkemudian — Prinsip bahawa jika sesuatu statut terdahulu dan terkemudian boleh dibacakan secara munasabah supaya kedua-dua boleh berkesan, ianya mesti dilakukan

Pemohon, seorang anggota Tentera Laut DiRaja Malaysia memiliki 0.51g cannabis yang mana melanggar peruntukan s 6 Akta Dadah Berbahaya 1952. Mahkamah tentera menjatuhkan hukuman empat bulan penjara terhadap pemohon dan dia dibuang kerja dari perkhidmatan Seri Paduka Baginda. Melalui notis usul pemula ini, pemohon meminta dua deklarasi dari Mahkamah Tinggi. Satu daripadanya ialah mahkamah tentera tiada bidang kuasa samada secara statutori, secara sedia ada atau sebaliknya untuk membicarakan tuduhan terhadap seorang anggota Angkatan Tentera bagi kesalahan di bawah s 6 Akta Dadah Berbahaya 1952 dibaca sekali dengan ss 87 dan 88 Akta Angkatan Tentera 1972 sebelum beliau dibicarakan, didapati salah dan disabitkan untuk kesalahan tersebut dalam mahkamah awam. Deklarasi yang kedua ialah bahawa pihakberkuasa yang mengadakan mahkamah tentera telah bertindak secara ultra vires dalam mahkamah tentera terhadap pemohon untuk kesalahan tersebut.

Diputuskan, menolak permohonan pemohon:

(1) Seksyen 88 Akta AngkatanTentera 1972 yang berkuatkuasa pada 1 Jun 1976 memberi bidang kuasa kepada mahkamah tentera untuk membicarakan dan menjatuhkan hukuman bagi kesalahan-kesalahan awam dan adalah nyata dari seksyen tersebut bahawa kesalahan-kesalahan di bawah Akta Dadah Berbahaya 1952 (selepas ini disebut sebagai 'Akta berkenaan') jatuh di bawah kesalahan-kesalahan awam.

(2) Masalah ialah samada pindaan kepada s 41 Akta berkenaan (A426) yang berkuatkuasa pada 10 Mac 1978 itu bercanggah dengan s 88 Akta Angkatan Tentera 1972 oleh kerana bidang kuasa kesalahan Akta berkenaan diberi kepada mahkamah sesyen atau Mahkamah Tinggi melalui seksyen kecil (1) and (2) s 41, dan seksyen kecil (3) pula memperuntukkan bahawa seksyen kecil (1) and (2) mempunyai kuasa walau ada apa-apa undang-undang bertulis yang sebaliknya, manakala bidang kuasa diberi pula kepada mahkamah tentera melalui s 88 Akta AngkatanTentera itu.

(3) Mahkamah berpendapat bahawa kedua-dua peruntukan tidak bercanggah kerana s 88 Akta Angkatan Tentera tidak